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15 UNITED STATES DISTRICT COURT
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18 EASTERN DISTRICT OF WASHINGTON
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21 United States of America,
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23 Plaintiff,
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25 v.
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27 Firestack-Harvey, et al,
28
29 Defendant.
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No. 13-CR-00024-FVS
Non-Party Google Inc.'s Motion to
Quash Witness Subpoena
05/9/2014
Without Oral Argument

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35 I. INTRODUCTION
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37 Fed. R. Evid. 902(11) is intended to obviate the need for a live witness to
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39 authenticate business records. To that end, Google Inc. ("Google") provided
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41 the Government with a 902(11) declaration to authenticate and admit certain
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43 business records that the government intends to use at trial. Despite the dictates
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MOTION TO QUASH
(13-CR-00024-FVS) – 1

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1 of Rule 902(11), the government has served non-party Google with a witness
2 subpoena to authenticate those records (hereafter, the “Witness Subpoena”).
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6 *See* Exhibit 1 to the Declaration of Darren Hubbard (“Hubbard Decl.”). The
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of Rule 902(11), the government has served non-party Google with a witness subpoena to authenticate those records (hereafter, the “Witness Subpoena”). *See* Exhibit 1 to the Declaration of Darren Hubbard (“Hubbard Decl.”). The Witness Subpoena demands that Google send one of its California-based records custodians to Spokane to testify in this case. Google understands that the Government seeks testimony solely to establish the authenticity of the records produced—records within the ambit of Rules 803(6) and 902(11).

Google submits that the Witness Subpoena be quashed as unreasonable and oppressive because Google’s business records can be authenticated and admitted without live testimony. *See* Fed. R. Cr. P. 17(c)(2).

II. FACTUAL BACKGROUND

On November 13, 2012, Google received a subpoena from the Drug Enforcement Agency requesting certain business records related to a Gmail account. *See* Hubbard Decl., ¶ 4. Two days later, Google produced a PDF document containing responsive records, along with a certificate of authenticity consistent with Rules 803(6) and 902(11). *Id.*

On May 6, 2014, Google received a Witness Subpoena from the United States Attorney’s Office, Eastern District of Washington, pursuant to Federal

1 Criminal Rule 17. *See* Hubbard Decl., Ex. 1. The Witness Subpoena demands
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 3 that Google's Custodian of Records appear and testify at trial regarding its
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 5 productions in response to the subpoena. Google understands that the
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 7 Government believes Defendant may object to any certification in lieu of live
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 9 testimony, and therefore seeks live testimony to establish the authenticity of the
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 11 records produced by Google, but no issue has been raised as to the regularity,
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 13 completeness or authenticity of the records. *See* Hubbard Decl., ¶ 6. Google
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 15 has attempted to resolve this matter to no avail, and therefore files this Motion
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 17 to Quash.
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25 III. ARGUMENT

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 27 Federal Rule of Criminal Procedure 17(c)(2), permits a court to "quash
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 29 or modify [a] subpoena if compliance would be unreasonable or oppressive."
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 31 *See, e.g., U.S. v. Bergeson*, 425 F.3d 1221, 1227-28 (9th Cir. 2005)
 32
 33 (upholding a district court order quashing a subpoena for testimony pursuant
 34
 35 to Fed. R. Crim. P. 17(c)(2)); *U.S. v. Washington*, No. CR 11-61-M-DLC,
 36
 37 2012 WL 3061519 (D. Mont. July 26, 2012) (granting motion to quash
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 39 witness subpoena under Rule 17(c)(2)).
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1 **A. The Witness Subpoena Seeks Duplicative and Unnecessary**
 2 **Testimony**

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 4 Federal Rule of Evidence 803(6)¹ provides an exception to the hearsay
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 6 rule for records of regularly conducted activity as “shown by the testimony
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 8 of the custodian or other qualified witness, *or by a certification that complies*
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 10 *with Rule 902(11)....*” (emphasis added). This exception applies if:
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- 12
 13
 14 (A) the record was made at or near the time by — or from information
 15 transmitted by — someone with knowledge;
 16 (B) the record was kept in the course of a regularly conducted activity
 17 of a business, organization, occupation, or calling, whether or not for
 18 profit;
 19 (C) making the record was a regular practice of that activity . . . and
 20 (D) neither the source of information nor the method or circumstances
 21 of preparation indicate a lack of trustworthiness.
 22

23
 24 Under Federal Rule of Evidence 902(11), extrinsic evidence of
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 26 authenticity as a condition precedent to admissibility is not required with
 27
 28 respect to the following:
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30
 31 **(11) Certified Domestic Records of Regularly Conducted**
 32 **Activity.**—The original or a duplicate of a domestic record that meets
 33 the requirements of Rule 803(6)(A)-(C), as shown by a certification of
 34 the custodian or another qualified person that complies with a federal
 35 statute or a rule prescribed by the Supreme Court. Before the trial or
 36 hearing, the proponent must give an adverse party reasonable written
 37 notice of the intent to offer the record—and must make the record and
 38 certification available for inspection—so that the party has a fair
 39 opportunity to challenge them.
 40

41
 42 Here, the documents produced contain information recorded by
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1 Google servers automatically at the time, or reasonably soon after, it was
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3 entered or transmitted by the user. *See* Hubbard Decl. Exs. 2-3; *see also* Fed.
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5 R. Evid. 803(6)(A),(B). The records were kept in the course of regularly
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7 conducted activity by Google, and were made in course of regularly
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9 conducted activity as a regular practice by Google. *See* Hubbard Decl. Exs.
10
11 2-3; *see also* Fed. R. Evid. 803(6)(C),(D). Google is aware of no allegation
12
13 of untrustworthiness. *See, e.g.*, Fed. R. Evid. 803(6)(E). There can be no
14
15 dispute that the documents are Google's business records under Rule 803(6),
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17 or that Google's declarations comply with Federal Rule 902(11). Therefore,
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19 the documents produced by Google have already been authenticated and the
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21 Government's request for testimony is duplicative and unreasonable.
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30 The Supreme Court's decisions in *U.S. v. Melendez-Diaz*, 557 U.S.
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32 305 (2009) (upholding Confrontation Clause challenge against admission of
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34 analyst report attesting that the substance analyzed was cocaine) and
35
36 *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011) (upholding Confrontation
37
38 Clause challenge against admission of blood alcohol analysis) do not change
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40 this analysis, as those cases concerned reports expressly produced for
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42 purposes of a criminal proceeding. By contrast, and as explained in
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1 *Melendez-Diaz*, “[b]usiness and public records are generally admissible
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3 absent confrontation” because they are “created for the administration of an
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5 entity’s affairs and not for the purpose of establishing or proving some fact at
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7 trial” and are therefore “not testimonial.” *Melendez-Diaz*, 557 U.S. at 324.
8
9 Courts generally agree that business records are non-testimonial and do not
10
11 implicate the Confrontation Clause. *See U.S. v. James*, 712 F.3d 79, 102 (2d
12
13 Cir. 2013) (rejecting Defendant’s appeal, holding that toxicology report was
14
15 non-testimonial and that admission did not implicate Confrontation Clause);
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17 *U.S. v. Feliz*, 467 F.3d 227, 237 (2d Cir. 2006) (rejecting Defendant’s appeal
18
19 and holding that non-testimonial business records do not implicate the
20
21 Confrontation Clause); *U.S. v. Anekwu*, 695 F.3d 967 (9th Cir. 2012)
22
23 (rejecting Confrontation Clause challenge from defendant and upholding
24
25 admission of foreign mailbox applications and banks records authenticated
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27 by records custodian certificate, noting that use of certificates is permissible
28
29 where the purpose is to authenticate records and not to establish facts); *U.S.*
30
31 *v. Yeley-Davis*, 632 F.3d 673, 677-81 (10th Cir. 2011) (rejecting
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33 Confrontation Clause challenge from defendant and upholding admission of
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35 phone records authenticated by 902(11) declaration from Verizon’s records
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1 custodian); *U.S. v. Green*, 396 Fed. Appx. 573, 574-75, 2010 WL 3401485,
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 3 at *2 (11th Cir. 2010) (same as to declaration from Metro PCS custodian)
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 5 (unpublished); *U.S. v. Weiland*, 420 F.3d 1062, 1077 (9th Cir. 2005)
 6
 7 (requiring records custodians “to make themselves available for cross-
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 9 examination in the countless criminal cases heard each day in our country
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 11 would present a serious logistical challenge without any apparent gain in the
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 13 truth-seeking process”) (internal quotation marks omitted).²
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 20 Indeed, to compel Google to send a witness to provide live testimony
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 22 would defeat the purpose of Rule 902(11), as noted by one of its drafters:
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25 One of the most useful (though perhaps least noticed)
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 29 ² *Cf. U.S. v. Marshall*, No. 07-20569-CR, 2008 WL 2474662, at *2 (S.D. Fla.
 30
 31 June 17, 2008) (ordering “issuance of a subpoena to the records custodian of
 32
 33 Yahoo, accompanied by an appropriate Affidavit for the records custodian to
 34
 35 complete to establish the authenticity of these [email] records to obviate the
 36
 37 need for the appearance of the records custodian at trial.”); *U.S. v. Doolittle*,
 38
 39 341 F. Supp. 163, 169 (M.D. Ga. 1972) (quashing witness subpoena where the
 40
 41 only possible relevant testimony would involve ministerial matters already
 42
 43 covered by an affidavit before the court), *judgment aff’d*, 507 F.2d 1368 (5th
 44
 45 Cir. 1975), *on reconsideration*, 518 F.2d 500 (5th Cir. 1975) *and cert.*
 46
 47 *dismissed*, 423 U.S. 1008, 96 S. Ct. 439, 46 L. Ed. 2d 380 (1975).

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accomplishments of the Judicial Conference's Advisory Committee on the Rules of Evidence during this Court's tenure as its Chairman was in adding a new Rule 902(11) to the self-authentication provisions of Rule 902. That new provision was intended to obviate the need for live witnesses to parade to the stand to support the admission into evidence of business records.

United Asset Coverage, Inc. v. Avaya Inc., 409 F. Supp. 2d 1008, 1052 (N.D. Ill. 2006); *see also Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534, 552 (D. Md. 2007) ("Rule 902(11) also is extremely useful because it affords a means of authenticating business records under Rule 803(6), one of the most used hearsay exceptions, without the need for a witness to testify in person at trial").

B. The Witness Subpoena Imposes a Burden on Google That Outweighs the Government's Need for Testimony

In assessing whether to enforce a witness subpoena issued pursuant to Federal Rule of Criminal Procedure 17, it is useful to look to precedent under Federal Rule of Civil Procedure 45, since the two are "substantially the same." *See* Advisory Committee Notes, 1944 Adoption of Rule 17.

When assessing a motion to quash a subpoena under Rule 45, "the test for 'undue burden' is a balancing test that pits the need of the party for the sought production against the interests of the subpoenaed witness in resisting compliance." *See* 9 James Wm. Moore et al., *Moore's Federal Practice* §

1 45.32 (3d ed. 2007) *citing Positive Black Talk, Inc. v. Cash Money Records,*
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4 *Inc.*, 394 F.3d 357, 377 (5th Cir. 2004); *Northwestern Mem'l Hosp. v.*
5
6 *Ashcroft*, 362 F.3d 923, 927-28 (7th Cir. 2004); *Heidelberg Ams., Inc. v.*
7
8 *Tokyo Seisakusho, Ltd.* 333 F.3d 38, 40 (1st Cir. 2003).

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10
11 The Government cannot demonstrate any interest in enforcing the
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13 Witness Subpoena beyond proving that which has already been proven: the
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15 documents produced by Google are authentic business records under Federal
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17 Rules of Evidence 803(6) and 902(11). Google understands that the
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19 Government seeks live testimony primarily because it is concerned that
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21 Defendant will unreasonably argue that a declaration is inappropriate for
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23 some unexpressed reason.
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30 Google, on the other hand, can demonstrate a significant interest in
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32 opposing the Witness Subpoena. Specifically, Google maintains a dedicated
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34 team for responding to legal process. *See* Hubbard Decl. ¶ 2. Google's
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36 California-based team receives tens of thousands of requests for assistance
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38 yearly. *Id.* The types of investigations that lead to these requests run the
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40 gamut from drug cases and kidnapping to routine civil and criminal demands
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42 for records. *Id.* Courts throughout the country have accepted Google's
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1 declarations of authenticity for business records pursuant to Rule 902(11). *Id.*
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4 If courts suddenly refused to accept Google's declarations of authenticity,
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6 forcing Google to send a witness (or witnesses) to attend every criminal trial
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8 in which its business records are offered as evidence, Google could not
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10 sufficiently staff its team. *Id.*
11
12

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14 Accordingly, when the Government's tenuous interest in enforcing the
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16 Witness Subpoena is weighed against non-party Google's interest in seeing
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18 that it is not enforced, the balance favors Google. More, third party record
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20 custodians should not be held hostage to pretrial brinksmanship of the
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22 parties.
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27 28 IV. CONCLUSION

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30 For the reasons stated, Google respectfully requests that the Witness
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32 Subpoena be quashed in its entirety as unreasonable and oppressive.
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2 DATED: May 8, 2014
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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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43 **I certify under penalty of perjury under the laws**
44 **of the State of Washington that the foregoing is**
45 **true and correct.**
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1 EXECUTED at Seattle, Washington, on May 8, 2014.
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3

4 s/ Nancy Lygren
5 _____

6 Nancy Lygren
7 Legal Secretary
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